FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1655

NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

KAISER GYPSUM COMPANY, INC.,
*Petitioner*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO; (SAN DIEGO ASBESTOS LITIGATION PLAINTIFFS, Real Parties in Interest),
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DISTRICT ONE

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*Attorneys for Petitioner*

## QUESTION PRESENTED

Where State law precludes service of process more than three years after commencement of an action, does a Court violate a defendant's right to due process by holding it bound by a decision that it is not entitled to challenge service after three years where said decision was made in a hearing in which the defendant was not present or represented.

# LIST OF PARTIES

Superior Court of the State of California, County of San Diego

San Diego Asbestos Litigation Plaintiffs

## CASE LIST

| NAME | CASE NO. | NAME | CASE NO. |
|---|---|---|---|
| Barker | 481302 | Holm | 481396 |
| Bell | 481399 | Hunn | 478546 |
| Bestiny | 481361 | Kelley | 469838 |
| Blalock | 481407 | Lutack | 479951 |
| Bolden | 481533 | Majomut | 481300 |
| Busgen | 481405 | Manning | 460769 |
| Cody | 481417 | Maudsley | 481367 |
| Contraeras | 481400 | Medina | 481362 |
| Cruppi | 481363 | Rackley | 481368 |
| Cupp | 481417 | Romano | 481364 |
| Duran | 481415 | Silva | 480255 |
| Eldridge | 469835 | Speratos | 481406 |
| Fickle | 478829 | Todd | 480632 |
| Fisher | 481410 | Venn | 481635 |
| Frandin | 481395 | Weiss | 481403 |
| Halpin | 481396 | Wilson | 481403 |
| Hill | 481397 | Yager | 481633 |

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| Section 583.250 | 3 |

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO; (SAN DIEGO ASBESTOS LITIGATION PLAINTIFFS, Real Parties in Interest),
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DISTRICT ONE

## OPINIONS BELOW

The Supreme Court of California's denial of the petition for review is reproduced in the Appendix hereto at A-2. The denial of the petition for writ of mandate by the Court of Appeal, State of California, Fourth Appellate District, Division One, appears in the Appendix at A-3. The order of the Superior Court of the State of California, County of San Diego, denying Petitioner's motion to dismiss appears in the Appendix at A-4.

## JURISDICTION

Petitioner's application for review was refused by the Supreme Court of California on December 18, 1985.

The statutory provision conferring jurisdiction on this Court to review the decision in question by writ of certiorari is 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, amendment XIV, § 1, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTES INVOLVED

California Code of Civil Procedure § 583.210 provides as follows:

> "§ 583.210. Time for Service and Return
> (a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the púrpose of this subdivision an action is commenced at the time the complaint is filed.
> (b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant."

California Code of Civil Procedure § 583.250 provides as follows:

> "(a) If service is not made in an action within the time prescribed in this article:
>
> (1) The action shall not be further prosecuted and no further proceedings shall be held in the action.
>
> (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.
>
> (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

## STATEMENT OF THE CASE

California law requires service of summons on a defendant within three years of commencement of the action, and *mandates* dismissal as to any defendant not so served. In the present action, petitioner Kaiser Gypsum Company, Inc.[1] ("Kaiser Gypsum"), moved to dismiss 34 summons and complaints filed on behalf of plaintiffs in the consolidated In Re San Diego Asbestos Litigation which were served on petitioner more than three years (plus 125 days during which all asbestos litigation pending before the Superior Court of California, County of San Diego, was stayed) after commencement of the 34 actions.

The Superior Court denied Petitioner's motion to dismiss on the ground that the Court on May 10, 1985, at a hearing where Petitioner was not represented, ruled that plaintiffs could serve Kaiser Gypsum despite the expiration of three years and 125 days from the commencement of the actions. Petitioner contends, however, that as Petitioner was not a party to the San Diego Asbestos Litigation actions at the time of the aforementioned May 10, 1985 hearing, and did not appear to oppose plaintiffs' motion, it is not bound by any Order issued as a result of those proceedings.

---

1. Kaiser Gypsum Company, Inc. is a wholly owned subsidiary of Kaiser Cement Company.

The Court of Appeal for the State of California, Fourth Appellate District, Division One, denied Kaiser Gypsum's petition for writ of mandate. Kaiser Gypsum's petition for review by the Supreme Court of California was also denied.

A brief summary of the essential facts upon which Petitioner's motion to dismiss was based is necessary at this point.

On or about October 30, 1980, one hundred and five (105) plaintiffs filed a complaint for damages for personal injuries naming numerous defendants in the Superior Court of the State of California for the County of San Diego. This complaint was later severed and amended complaints were filed on behalf of individual plaintiffs. Since that time, additional complaints have been filed on behalf of plaintiffs seeking damages from several defendants, claiming that exposure to asbestos-containing products caused or contributed to their alleged injuries.

None of the original summons or complaints on file in this litigation contained any reference to Petitioner Kaiser Gypsum. Until June 25, 1985, Petitioner was never served with the above-referenced summons and complaints, nor had Petitioner otherwise entered a general appearance in these matters.

At all relevant times, Petitioner, a Washington corporation, was a subsidiary of Kaiser Cement Corporation (''Kaiser Cement''), a Delaware corporation (a California corporation until May of 1982). At the present time, both entities are still in existence. Kaiser Cement was known as Kaiser Cement & Gypsum Corporation until 1979. For legal purposes, Kaiser Cement and Kaiser Cement & Gypsum Corporation are one and the same. No more than a change of names took place in 1979.

Though Kaiser Cement and Kaiser Cement & Gypsum Corporation are identical, Petitioner was, and continues to be a separate legal entity. Kaiser Cement (aka Kaiser Cement & Gypsum Corporation) and Petitioner had separate bank accounts, personnel departments, personnel records, accounting divisions, sales offices, sales records, manufacturing facilities, boards of directors, board meetings and board minutes, articles and by-laws, research departments and product lines.

Additionally, the two entities were incorporated in different states, and, with some overlaps, were qualified to do business in different states and had different marketing areas.

On or about April 5, 1985, Kaiser Cement filed a motion for summary adjudication of the issue as to whether Kaiser Cement or its predecessor Kaiser Cement & Gypsum Corporation is or was liable for the actions or torts of its subsidiary, Kaiser Gypsum.

On or about April 30, 1985, San Diego Asbestos Litigation plaintiffs filed opposition papers to Kaiser Cement's above-referenced motion, and, in addition, moved for leave of court to file amendments to complaints substituting Petitioner as a DOE defendant. Arguments on Kaiser Cement's Motion for Summary Adjudication and plaintiffs' Motion to File Amendments to Complaints were heard by the Superior Court on May 10, 1985. Kaiser Cement was represented by counsel at this hearing and opposed plaintiffs' motion. No appearance was made on behalf of Petitioner.

On or about May 23, 1985, the Superior Court issued an order denying Kaiser Cement's motion for summary adjudication of issues and granting plaintiffs' motion to amend complaints and to substitute Petitioner Kaiser Gypsum as a DOE defendant. The Superior Court ruled that Kaiser Cement was estopped to raise the bar of California Code of Civil Procedure § 583.210 despite the fact that service of summons and complaints on Petitioner was not within three years (plus 125 days) of commencement of the actions.

On or about June 25, 1985, Kaiser Gypsum was served with summons and complaints on behalf of 41 plaintiffs in the San Diego Asbestos Litigation. Thirty-four (34) of these actions were commenced more than three years plus 125 days prior to service on Petitioner.

On or about July 26, 1985, Kaiser Gypsum moved for

dismissal of said actions on the ground that the statutory time period for service on Petitioner had expired.

The hearing on Petitioner's Motion to Dismiss was held on August 9, 1985. On August 16, 1985, the Court issued its order denying Petitioner's Motion on the ground that counsel for Kaiser Cement, who appeared in opposition to plaintiffs' Motion to File Amendments to Complaints heard by the Court on May 10, 1985 was "for all practical purposes" appearing on behalf of Petitioner and that Petitioner was bound by the Court's ruling that Kaiser Cement was estopped to raise the provisions of California Code of Civil Procedure § 583.210 as a bar to plaintiffs' service of summons on Petitioner.

## REASONS FOR GRANTING THE WRIT

California Code of Civil Procedures §§ 583.210 and 583.250 confer a liberty interest on civil defendants by substantially immunizing them from litigation of stale claims. Petitioner was not given an opportunity to present evidence in support of its motion to dismiss pursuant to Code of Civil Procedure §§ 583.210 and 583.250 at the hearing on the motion. The Court based its denial of Petitioner's motion not on an evaluation of the evidence, finding of facts or conclusions of law, but on the ground that Petitioner was bound by a ruling against Kaiser Cement in earlier proceedings to which Petitioner was not a party.

It is an established rule in American jurisprudence that one is not bound by a judgment in personam in litigation to which he is not a party. If the decision of the trial court is allowed to stand, it will violate Petitioner's due process right not to be bound by a decision rendered in proceedings to which it was not a party. Moreover, it will effectively deprive Petitioner without a hearing of the State-conferred freedom against subjection to litigation of stale claims provided by California State law.

## THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY HOLDING IT BOUND BY A DECISION MADE AT A HEARING IN WHICH PETITIONER WAS NOT PRESENT OR REPRESENTED

Under California Code of Civil Procedure §§ 583.210 and 583.250, dismissal is mandatory as to a party which has not been served with summons within three years from the commencement of the action. *Elling Corp., v. Sup. Ct.* (1975) 48 CA3d 89; 123 Cal. Rptr. 734. An action is "commenced" when the original complaint is filed against the defendants named therein. The three-year period for service and return runs from that date and is not extended by filing an amended or supplementary complaint. *Perati v. Atkinson* (1964) 230 CA 2d 251; 40 Cal. Rptr. 835.

The above rule applies even where the defendant seeking dismissal was served as one of the "DOE" defendants named in the original Complaint, which was later amended to show his true name. *Lesko v. Superior Court* (1982) 127 CA3d 476, 179 Cal. Rptr. 595.

In the present case, the three-year period (plus 125 days during which prosecution of the actions was stayed) provided by California Code of Civil Procedure § 583.210 began with the filing of the original 34 complaints which were the subject of Petitioner's Motion. Petitioner was not served as DOE 3 with Summons and Complaints in these cases until June 25, 1985.

In all 34 cases more than three years and 125 days had passed between the filing of the original complaints and service of summons and complaints on Petitioner. Accordingly, Petitioner moved to dismiss the actions pursuant to Code of Civil Procedure §§ 583.210 and 583.250.

Petitioner was not given an opportunity to present evidence to support its Motion to Dismiss at the hearing on the motion. Instead, the Court denied Petitioner's Motion to Dismiss on the

ground that counsel for Kaiser Cement, who appeared in opposition to plaintiffs' Motion to File Amendments to Complaints heard by the Court on May 10, 1985, was "for all practical purposes" appearing on behalf of Petitioner. The Court further determined that Petitioner was subject to its previous ruling that Kaiser Cement was estopped to raise the provisions of § 583.210 as a bar to plaintiffs' service of summons on Petitioner after the expiration of three years and 125 days.

In making this determination, the Court ignored the fact that counsel acting on behalf of Kaiser Cement, not Petitioner, had filed opposition papers and argued against plaintiffs' motion at the May 10, 1985 hearing. The Court also ignored the fact that its May 10, 1985 ruling held that Kaiser Cement, not Petitioner, was estopped to raise the provision of §§ 583.210 and 583.250 as a bar to untimely service of summons.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. 'Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Pennoyer v. Neff*, 95 U.S. 714 24 L.Ed. 565 (1877). Judicial action enforcing such a judgment against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Hansberry v. Lee, supra.*

*Hansberry v. Lee* directly addressed the question whether the adjudication by a Court that petitioners in that case were bound by a judgment rendered in prior litigation to which they were not parties, had deprived them of the due process of law guaranteed by the Fourteenth Amendment.

*Hansberry* concerned the question whether a group of landowners whose lands were mutually restricted by covenants restraining them and their successors from selling to Blacks could be bound by a suit brought by some of the landowners purporting to represent the entire group as a class. The Court

held that the landowners who were not parties to the original suit could not be held bound by virtue of the fact that the class was in inherent conflict as a result of the reciprocal nature of the covenants.

Similarly, Petitioner was not a party to the In Re San Diego Asbestos Litigation cases at the time the Superior Court ruled that Kaiser Cement was estopped to raise the provisions of California Code of Civil Procedure § 583.210 to bar service of plaintiffs' complaints on Petitioner.

The Court made no finding at the May 10, 1985 hearing that Petitioner, as well as Kaiser Cement, had performed any acts which could arguably estop Petitioner from raising § 583.210 as a bar to service of summons after the expiration of 3 years (plus 125 days). Moreover, the Court did not rule at that time or at any other time prior to Petitioner's Motion to Dismiss that any Order would apply to Petitioner as well as to Kaiser Cement.

Apparently, it was the Court's view, that Kaiser Cement's opposition to plaintiffs' amendments of their Complaints to bring in Petitioner, made as it was by the same attorney who later asserted similar grounds on behalf of Petitioner in support of its Motion to Dismiss, stood as adequate representation of Petitioner's interests at the May 10, 1985 hearing. In fact, the Court determined that counsel for Kaiser Cement was "for all practical purposes" acting on behalf of Petitioner at the earlier hearing and that Petitioner was therefore bound by the order granting plaintiffs' motion against Kaiser Cement's opposition to same.

Kaiser Cement and Petitioner are currently represented by the same counsel. However, Kaiser Cement and Petitioner have at all times, and continue to be, separate corporate entities with separate interests. Any questions regarding the separate corporate status of Kaiser Cement and Petitioner must be

resolved by the trial court. *Dow Jones v. Avenal* (1984) 1515 Cal. App. 3d 144, 147; 198 Cal. Rptr. 457. Until those questions are resolved, a ruling by the Court against Kaiser Cement *only* is not binding on Petitioner and cannot preclude Petitioner from proceeding on its own right to a review on the merits of its Motion to Dismiss.

## CONCLUSION

The Superior Court's determination that Petitioner was bound by its May 10, 1985 ruling against Kaiser Cement effectively deprived Petitioner of its due process right to a hearing on the merits of its Motion to Dismiss. Further, unless and until it is determined that Kaiser Cement and Petitioner are not separate entities, the extension of a ruling to Petitioner which was rendered against Kaiser Cement *only* violates Petitioner's due process right not to be bound by a decision rendered in proceedings to which it was not a party.

Respectfully submitted,

By: _____

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(415) 465-5212

*Attorneys for Petitioner*

**CERTIFICATE OF SERVICE**

I, Patrick J. Hagan, hereby certify that on the 7th day of April, 1986, I mailed 3 copies of the Petition by Certified Mail, return receipt requested, to the clerk of the Superior Court of the State of California, County of San Diego, 220 West Broadway, San Diego, California 92101, and 3 copies of the Petition by Certified Mail, return receipt requested, to Mr. Geary D. Cortes and Ms. Deborah C. Brickner, Ludecke, McGrath & Denton, 2333 First Street, Suite 201, San Diego, California 92101, Attorneys for San Diego Asbestos Litigation Plaintiffs, Real Parties in Interest.

PATRICK J. HAGAN

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**CLERK'S OFFICE, SUPREME COURT**
**4250 STATE BUILDING**

SAN FRANCISCO, CALIFORNIA 94102

DEC 1 8 1985

*I have this day filed Order* _____

REVIEW DENIED

*In re:* 4 Civil *No.* D003728

Kaiser Gypsum Company, Inc.

*vs.*

Superior Court, San Diego County

*Respectfully,*

*Clerk*

BEST AVAILABLE COPY

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# COURT OF APPEAL—STATE OF CALIFORNIA

## FOURTH APPELLATE DISTRICT

DIVISION ONE

KAISER GYPSUM COMPANY, INC.,

Petitioner,

v.

SUPERIOR COURT, etc, COUNTY OF SAN DIEGO,

Respondent;

SAN DIEGO ASBESTOS LITIGATION,

Real Party in Interest.

No. D003728

SUPERIOR COURT NO. C-481189

FILED
Keenan G. Casady, Clerk
OCT 16 1985
Court of Appeal Fourth District

THE COURT:

The petition for writ of mandate has been read and considered by Presiding Justice Kremer and Justices Wiener and Work. The petition is denied on the basis there is no showing of an abuse of discretion. Justice Work would issue an alternative writ.

Presiding Justice

Copies to: All Parties

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FILED
Robert D. Zumwalt, Clerk
AUG 16 1985
BY L. SLAUGH, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

| | |
|---|---|
| In the Matter of | Case Number 481189 |
| SAN DIEGO ASBESTOS LITIGATION, | ORDER AFTER HEARING |

On August 9, 1985, at 1:45 p.m., the Motion of defendant KAISER GYPSUM COMPANY, INC., to dismiss plaintiffs' actions against it came on regularly for hearing before the Honorable BEN W. HAMRICK in Department 25 of the above-entitled court. Deborah Brickner of the law firm of Ludecke, McGrath & Denton appeared on behalf of plaintiffs and E. Jane Wells of the law firm of Kincaid, Gianunzio, Caudle & Hubert appeared on behalf of defendant. Good cause appearing,

IT IS HEREBY ORDERED that KAISER GYPSUM COMPANY, INC.'s Motion to Dismiss is denied.

IT IS FURTHER ORDERED that sanctions in the amount of $200.00 be awarded the law firm of Ludecke, McGrath & Denton, payable forthwith.

Dated: AUG 16 1985

BEN W. HAMRICK
BEN W. HAMRICK
JUDGE OF THE SUPERIOR COURT